BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY J. RASH	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,000,394
	)	& 1,001,850
HEARTLAND CEMENT COMPANY	)	
Respondent	)	
AND	)	
	)	
SENTRY INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the September 21, 2004 Award entered by Special Administrative Law Judge Marvin Appling. The Board heard oral arguments on March 8, 2005.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are set forth in the Award. Moreover, at oral argument before the Board, the parties agreed both of these docketed claims should be combined into one claim and that July 15, 2002, which was the approximate date of claimant's last day of working for respondent before undergoing back surgery, was the appropriate accident date for claimant's work-related back injury.

ISSUES

The parties stipulate claimant injured his back working for respondent and that July 15, 2002, is the appropriate date of accident for these combined claims.

In the September 21, 2004 Award, Judge Appling determined claimant's permanent disability benefits should be reduced because he was receiving retirement benefits. Accordingly, the Judge granted claimant permanent disability benefits for a 25 percent whole body functional impairment. Judge Appling ruled, in pertinent part:

> Dr. Pollock stated he [claimant] has up to 25% impairment of the function to the body as a whole if he used the DRE method (see page 14 of Dr. Pollock's deposition), however he didn't use that in the 11% impairment rating that he gave to the Claimant.
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> Dr. Pollock gave him a 100% impairment from the back and then went on to find a 48% task loss and Dr. Prostic found a 20% (page 17 of the deposition) and a 63% task loss (page 18 and 19). Karen Terrill also found there was a task loss and testified in that regard. However, following the *Willie McIntosh v. Sedgwick County* case of 91,097 in the Court of Appeals of the State of Kansas, I find that K.S.A. 44-501h *[sic]* applies and that the Claimant is not entitled to a duplication of wage loss and therefore award only a 25% impairment of function to the body as a whole.[1]

Claimant contends Judge Appling erred. Claimant argues respondent and its insurance carrier failed to raise the retirement benefits reduction set forth in K.S.A. 44-501(h) before the parties' terminal dates expired and, therefore, it was waived. In the alternative, claimant argues respondent and its insurance carrier failed to prove the amount of the appropriate reduction. Claimant also argues he has a 100 percent wage loss, a 63 percent task loss, and an 81.5 percent work disability (a permanent partial general disability greater than the functional impairment rating). Accordingly, claimant requests the Board to increase his award of permanent disability benefits.

Conversely, respondent and its insurance carrier argue claimant's permanent disability benefits should be based upon an 11 percent whole body functional impairment as respondent offered claimant a job within his medical restrictions and claimant failed to make a good faith effort to perform it. Respondent and its insurance carrier also argue this proceeding should be remanded to the administrative law judge to determine the amount of weekly credit should the K.S.A. 44-501(h) retirement benefits reduction be applicable.

The issues before the Board on this appeal are:

1. Did claimant prove he made a good faith effort to return to work after recovering from his February 2003 back surgery?

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[1] ALJ Award (Sept. 21, 2004) at 5.

2. If not, what post-injury wage should be imputed to claimant for purposes of the permanent partial general disability formula of K.S.A. 44-510e?

3. If claimant is entitled to receive a work disability, what is his task loss?

4. Is the retirement benefit reduction set forth in K.S.A. 44-501(h) applicable?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. Claimant injured his back doing heavy lifting. Claimant's accident arose out of and in the course of his employment with respondent, who owns the cement plant where claimant worked. The parties agree the date of accident for purposes of both of these claims is July 15, 2002, which is the approximate date that claimant last worked for respondent before undergoing back surgery. The parties also agree these claims should be combined and considered as one.

2. After seeing several doctors, claimant eventually was referred to orthopedic surgeon Dr. Anthony G. A. Pollock. Dr. Pollock treated claimant between April 25, 2002, and August 27, 2003. Dr. Pollock diagnosed degenerative lumbar disc disease with spinal stenosis from the third through the fifth lumbar vertebrae and recommended back surgery. The doctor scheduled claimant for back surgery in July 2002, but that surgery was postponed because claimant experienced heart problems, which required surgery for arteriosclerotic heart disease. Consequently, claimant did not undergo his low back surgery until February 3, 2003.

3. In June 2003, after recovering from his heart and back surgeries, claimant prepared retirement papers electing to retire effective July 31, 2003. At that time, claimant reported to respondent's personnel administrator, Paula Beeman, that he had things resolved with Social Security and he was ready to retire. On July 15, 2003, claimant signed additional retirement documents, which designated August 1, 2003, as the date his retirement benefits would commence. Those documents also indicated claimant was required to contact United States Steel Corporation, which was the former owner of respondent's cement plant, and Carnegie Pension Fund if claimant returned to respondent's employ.

4. On August 19, 2003, after claimant's retirement officially commenced, respondent wrote claimant to advise he could return to work on August 25, 2003, as the company was able to accommodate Dr. Pollock's work restrictions. Respondent's August 19, 2003 letter reads:

> We have received a letter from Dr. Anthony Pollock dated July 22, 2003, stating that you could return to work with certain restrictions. Dr. Pollock's recommendation is a 20 pound lifting limit and occasional bending and twisting. Based on these restrictions we are able to accommodate you and return you to our employment. You will run the lathe with help getting pieces chucked in and sit and weld quarry hammers and other welding needs. There will also be other tasks on occasion that are within the recommended restrictions.
>
> This release with these restrictions is for the work related injury only. You should report to work on Monday, August 25, 2003 at 7 AM.[2]

At the time of the job offer, respondent believed the accommodated job would last, at least, until March 2004, when the plant was scheduled for maintenance.

5. On Saturday, August 23, 2003, respondent's vice president of manufacturing, Martin McClelland, e-mailed a union representative that if claimant wished to remain retired he was not required to report to work the following Monday. The note also stated claimant was required to comply with the rules applicable to returning to work after a disability, which included providing an authorization to return to work from the heart doctor who had previously indicated claimant was disabled. The e-mail read, as follows:

> Per our phone conversations this morning, please convey to Larry Rash that if he wishes to remain retired, he may do so. That is his decision and his alone. If he wishes to remain retired, it would not be necessary for him to report to work on Monday.
>
> The significance of Monday is only that Heartland has work available to accommodate his BACK restrictions ONLY. By reading the certified letter he can see that. That letter specifically does not address age, years of service, or health issues that were involved with his retirement. Remind him that all the rules of returning to work from disability apply. In his case, he must have a return to work authorization from the same heart doctor that stated he was disabled.[3]

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[2] Beeman Depo., Ex. 6.

[3] *Id.*, Ex. 14.

6. On August 25 and 26, 2003, claimant reported to the change house outside respondent's plant. Claimant did not enter the plant or otherwise report to respondent's personnel office to complete the necessary paperwork that would permit his resuming employment. Accordingly, respondent concluded claimant did not want to relinquish retirement. Ms. Beeman testified, in part:

> Q. (Mr. Phalen) Your testimony is that he came out and sat in the change room for two days and just didn't want to un-retire?
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> A. (Ms. Beeman) Yes. I never saw him sitting in the change house I was told he was sitting out --
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> Q. The change house, that's where workers go to change out of their civilian clothes into the work uniforms here?
>
> A. Correct.
>
> Q. Who told you he sat in the change house?
>
> A. Numerous people.
>
> Q. And who told you he just didn't want to un-retire?
>
> A. Marty McClelland.[4]

7. On August 27, 2003, which was the third day claimant was to be back at work, claimant saw Dr. Pollock for his final visit. Claimant testified Dr. Pollock told him he could not return to work for respondent.[5] Dr. Pollock also gave claimant a note containing the following restrictions:

> Maximum lifting 20 lbs. at home with occas. bending, twisting, standing as tolerated. Patient cannot return to work. He has reached MMI –[6]

Claimant presented that note to respondent and returned to retirement.

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[4] Beeman Depo. at 43-44.

[5] R.H. Trans. at 25.

[6] *Id.*, Cl. Ex. 1.

8. The confusion regarding claimant's ability to work was clarified by Dr. Pollock's deposition testimony. According to the doctor, claimant could work within the restrictions he provided claimant in the August 27, 2003 note. The doctor explained he added the words "at home" to reflect that claimant had a severe heart condition, which limited claimant's work activities. The doctor testified, in part:

> Q. (Mr. Ratzlaff) And I noticed that you put the words "at home" in your restrictions. Is it your intent by those words to say that he cannot work at all, if we again look just at his back condition?
>
> A. (Dr. Pollock) No. No. That reflects the fact that he has this severe heart condition which also limits him from doing any work, I believe. That's what I was -- what he told me. And the -- it was couched in those terms because I felt that he needed to be able to do some work around the house, and this was the limit that he could do, which would also be all that he could do at work.[7]

In short, Dr. Pollock testified claimant could not perform his former job with respondent[8] but that he could work within his restrictions.

9. Other than reporting to the change house for those two days in August 2003, claimant has made no effort to either return to work for respondent or find any other employment. Consequently, claimant has not worked for any employer since approximately July 15, 2002, when he last worked for respondent.

10. At the February 11, 2004 regular hearing, claimant testified he was receiving $1,563 per month in Social Security disability benefits (which commenced in July 2003 but were backdated to January 2003) and was receiving $538 per month in retirement benefits from respondent, which he testified he did not contribute to.[9]

11. On the other hand, Ms. Beeman testified in June 2004 that claimant's retirement pension came from funds that claimant had paid into his retirement plan.[10] Ms. Beeman also indicated the entire plant did not shut down in March 2004 as scheduled and, therefore, she assumed the accommodated job that respondent had offered to claimant would have continued past March 2004.

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[7] Pollock Depo. at 9-10.

[8] *Id.* at 13.

[9] R.H. Trans. at 60-62.

[10] Beeman Depo. at 56.

12. Dr. Pollock determined claimant sustained an 11 percent whole body functional impairment as rated under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). The doctor noted he did not use the DRE (Diagnosis-Related Estimates) method in the *Guides* to rate claimant. Although the doctor initially testified claimant would probably have a 25 percent whole person functional impairment under the DRE model of the *Guides*, Dr. Pollock later indicated that rating was not really appropriate.[11]

13. Dr. Pollock reviewed the list of former work tasks prepared by respondent's vocational expert witness, Monty Longacre, and concluded claimant had lost the ability to perform 13 of 27, or 48 percent,[12] of the work tasks claimant performed in the 15-year period before his July 2002 back injury.

14. Claimant's attorney hired Dr. Edward J. Prostic to evaluate claimant for purposes of these claims. Dr. Prostic saw claimant in both December 2001 and in October 2003 and diagnosed lumbar spinal stenosis that was either caused or permanently aggravated by the work claimant performed for respondent. Dr. Prostic used the *Guides*' Range of Motion Model and rated claimant as having a 20 percent whole person functional impairment due to his work-related back injury. Like Dr. Pollock, Dr. Prostic also utilized Table 75 of the *Guides*. But Dr. Prostic added impairment for loss of motion and neurologic deficits.

15. Dr. Prostic concluded claimant should not lift more than 20 pounds, should avoid frequent bending or twisting at the waist, avoid forceful pushing and pulling, avoid captive positions, avoid more than minimal use of vibrating equipment, and avoid prolonged sitting and standing. Dr. Prostic reviewed the list of former work tasks prepared by claimant's expert vocational witness, Karen Crist Terrill, and determined claimant lost the ability to perform 12 of 19, or 63 percent, of his former work tasks.

16. Respondent presented the testimony of Mr. Longacre. Mr. Longacre concluded there were job openings with employers within 60 miles of claimant's home in Moline, Kansas, and those jobs paid between $5.27 and $8 per hour. Moreover, one job paid as much as $40,000 per year. Sales and customer service positions,

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[11] Pollock Depo. at 16.

[12] The Board notes the doctor testified claimant could not perform 12 of his 27 former tasks, but the doctor noted on the task list he reviewed that claimant was unable to perform 13.

a shift miller position, sewing machine operator, sales clerk, utility worker, and outside sales position comprised Mr. Longacre's list of job opportunities.[13]

17. On the other hand, Ms. Terrill evaluated claimant's employment opportunities mistakenly believing that Dr. Pollock had restricted claimant from performing any and all work. Consequently, Ms. Terrill concluded claimant was unable to engage in substantial, gainful employment. Unlike Mr. Longacre, Ms. Terrill did not include in her list of former work tasks any tasks that claimant performed raising calves.

CONCLUSIONS OF LAW

Claimant has sustained a low back injury. Consequently, claimant's permanent disability compensation is governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

[13] Longacre Depo. at 10-11.

But that statute must be read in light of *Foulk*[14] and *Copeland*.[15] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the post-injury wage should be based upon the worker's retained ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[16]

And the Kansas Court of Appeals in *Watson*[17] held that failing to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[18]

The Board concludes claimant has failed to prove that he made a good faith effort to find appropriate employment after recovering from his low back surgery. The medical evidence is overwhelming that claimant's low back injury does not prevent him from working. And claimant testified his heart doctor had not restricted him from work. In short, claimant retained the ability to work but did not seek employment other than the minimal

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[14] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[15] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[16] *Id.* at 320.

[17] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[18] *Id.* at Syl. ¶ 4.

effort in reporting to respondent's change house. Consequently, a post-injury wage should be imputed.

The record does not disclose the wages claimant would have received for performing the accommodated job that respondent proposed. Moreover, Ms. Terrill did not provide an opinion regarding claimant's retained ability to earn wages as she mistakenly concluded that claimant was unable to engage in substantial, gainful employment. Consequently, Mr. Longacre's opinion regarding claimant's retained ability to earn wages is the only opinion in the record. The Board is not persuaded that claimant is able to earn $40,000 per year. But the Board does find that claimant is able to earn between $5.27 and $8 per hour, which averages $6.64 per hour or $265.60 per week. Comparing $265.60 per week to claimant's stipulated pre-injury wage of $1,036.82 per week yields a 74 percent wage loss.

The other prong of the permanent partial general disability formula is the loss of work tasks. As indicated above, Dr. Pollock reviewed Mr. Longacre's list and determined claimant had a 48 percent task loss and Dr. Prostic reviewed Ms. Terrill's list and concluded claimant had a 63 percent task loss. The Board is not persuaded that either percentage is more accurate than the other. Consequently, the Board averages those percentages and concludes that claimant sustained a 56 percent task loss due to his work-related injury.

Averaging the 56 percent task loss with the 74 percent wage loss yields a 65 percent work disability. The Board finds claimant's whole person functional impairment is 16 percent, which is an average of Dr. Pollock's 11 percent rating and Dr. Prostic's 20 percent rating. Consequently, claimant is entitled to receive benefits for a 65 percent permanent partial general disability under K.S.A. 44-510e.

Respondent and its insurance carrier's request for a retirement benefit reduction under K.S.A. 44-501(h) should be denied. That statute provides:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The statute does not apply to Social Security disability benefits and, therefore, those payments do not reduce the disability benefits claimant is awarded. Moreover, respondent and its insurance carrier have failed to satisfy their burden of proof under the above-quoted statute regarding the company's retirement pension. Claimant testified he did not contribute to the retirement pension plan. But respondent's personnel administrator provided the final word on that issue and testified that claimant's retirement pension came from funds which claimant had paid into the retirement plan.

In short, claimant is entitled to receive benefits for a 65 percent permanent partial general disability without any reduction or credit.

AWARD

WHEREFORE, the Board modifies the September 21, 2004 Award and increases claimant's permanent partial general disability from 25 percent to 65 percent.

Larry J. Rash is granted compensation from Heartland Cement Company and its insurance carrier for a July 15, 2002 accident and resulting disability. Based upon an average weekly wage of $1,036.82, Mr. Rash is entitled to receive 19.12 weeks of temporary total disability benefits at $432 per week, or $8,261.84, plus 212.36 weeks of permanent partial general disability benefits at $432 per week, or $91,738.16, for a total not to exceed $100,000.

As of April 15, 2005, Mr. Rash is entitled to receive 19.12 weeks of temporary total disability compensation at $432 per week, or $8,261.84, plus 124.43 weeks of permanent partial general disability compensation at $432 per week, or $53,753.76, for a total due and owing of $62,015.60, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $37,984.40 shall be paid at $432 per week until paid or until further order of the Director.

Respondent and its insurance carrier are required to pay the administrative costs in these claims.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority. We concur that claimant failed to prove he made a good faith effort to return to work for respondent in August 2003 and we also concur that the record fails to set forth the wages that claimant would have earned in the job that he was offered. But we would find it was more probably true than not true that the accommodated job would have paid a wage that was comparable to claimant's pre-injury wage, which would limit claimant's permanent partial general disability to his 16 percent whole person functional impairment rating.

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director